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### Recent Decisions

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## Recent Decisions

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**Chattel Mortgage — Possession By Mortgagee Pursuant To Void Mortgage — Effect On Creditors.** *Haskins v. Dube*, 138 A. 2d 677 (N.H., 1958). A mortgagor gave a recorded chattel mortgage on present and after acquired stock in trade, retaining possession for sale in his usual course of business, without having to account to the mortgagee for the proceeds. The mortgagee bought in at a valid foreclosure sale and took constructive possession of the stock with the knowledge of the plaintiff, a general creditor of the mortgagor, the defendant. Subsequently the stock in trade was attached by the plaintiff and sold at public auction, the proceeds thereof being held by the sheriff pending the outcome of this litigation, in which the mortgagee intervened. The trial court ruled that the creditor's claim was superior to that of the mortgagee. The mortgagee took exception and was sustained by the Supreme Court of New Hampshire. The general rule that the mortgagor's right to sell without accounting renders the chattel mortgage invalid may be relaxed in those cases where the mortgagee has obtained possession before other creditors of the mortgagor have attached the goods. The mortgagee's superior rights in the after acquired property, even though such a provision may be good only between the parties, was also upheld contingent upon the mortgagee taking possession prior to attaching creditors.

The authorities are in conflict as to whether a mortgage, originally void as to creditors, is validated by the mortgagee taking possession before attachment by the creditors. 10 AM. JUR., Chattel Mortgages, 821, 828, §§162, 170. The cases are collected in 25 L. R. A. (N.S.) 110. In Maryland, since 1939, certain chattel mortgages on after acquired goods, are valid, 2 MD. CODE (1957), Art. 21, §52. See *Grimes v. Clark*, 234 F. 604 (4th Cir., 1916), which allowed the trustee in bankruptcy to prevail over a mortgagee who had taken possession of the goods six days before the bankruptcy petition, pursuant to a mortgage on after acquired property (which was then void in Maryland). Cf. *Edelhoff v. Horner-Miller Mfg. Co.*, 86 Md. 595, 612, 39 A. 314 (1898).

**Damages — Supervisory Expenses — Overhead As Part Of Cost Of Production.** *Apex Metal Stamping Co. v. Alexander & Sawyer, Inc.* 48 N. J. S. 476, 138 A. 2d 568

(1958). The defendant prevented the plaintiff from fully performing an agreement between them for the manufacture of tire stands. The lower court, in awarding damages on the basis of contract price minus the costs of production, did not include the value of supervisory services in the cost of production. On appeal the Superior Court of New Jersey, Appellate Division, held that the initial assumption is that the value of supervisory services and other overhead must be included in the measurement of the cost of production. Nevertheless, the obligor can disprove this presumption by showing, first, that he did not realize any automatic pecuniary saving through release of supervisory personnel; and second, he did not realize any other compensating advantage from the default, such as being able to accept new contractual obligations which would not have been in the capacity of his supervisory personnel if the contract in question had to be completed. In accordance with this holding, the court remanded the case for further proceedings in order to allow the plaintiff an opportunity to disprove the aforementioned initial assumption.

In *M & R Contractors & Builders v. Michael*, 138 A. 2d 350, 358 (Md., 1958), the Maryland Court of Appeals held pursuant to MARYLAND RULE 885, that, where it could be shown that a builder has been prevented from performing his contractual obligation and that his entire time would have been required for the performance thereof, any gain he might make with reasonable efforts, without being subjected to additional risk of loss or injury, and which gain he could not realize had he not been discharged from the defendant's contract, must be deducted from the plaintiff's damages. However, if the defendant cannot show that the builder's entire time was required for the completion of the contract in question, any gain which the builder made from another contract which he took on either before or immediately after the repudiation should not be considered in reducing his recovery of full damages.

The above decisions seem to be contrary to the prevailing view as expressed in *Olds v. Mapes-Reeve Const. Co.*, 177 Mass. 41, 58 N. E. 478 (1900), in which case the Supreme Judicial Court of Massachusetts held that the gain received by a sub-contractor for completing a project, on behalf of the owner, after the contractor had repudiated his contract with the subcontractor, should not have been considered in reducing his recovery of full damages.

Other cases in point are collected in 50 A. L. R. 1397 and 15 AM. JUR., Damages, 575, §158.

**Insurance — Effect Of Renunciation Of Life Insurance Policy By Beneficiary In Divorce Property Settlement.** *Prudential Insurance Co. of America v. Broadhurst*, 321 P. 2d 75 (Cal., 1958). Plaintiff brought this interpleader action to determine conflicting claims involved in a life insurance policy. The insured had changed the beneficiary three times and at the time of his death the defendant, the insured's ex-wife, remained the policy beneficiary. However, in a property settlement executed upon the divorce of defendant and decedent, defendant transferred "to husband any interest she may have in the life insurance policy on the life of the husband" (77). The beneficiary had not been changed since the divorce. The insured's administratrix claimed that the effect of the property settlement was a waiver of defendant's right to the proceeds. The lower court's judgment for defendant was affirmed on appeal. Since the insured had changed the beneficiary several times before the divorce, his failure to make any changes afterwards indicated that he intended the defendant to have the proceeds.

There appears to be no Maryland decision directly in point on the question of whether a property settlement is an effective renunciation of a life insurance policy by the beneficiary. But see *Daly v. Daly*, 138 Md. 155, 162, 113 A. 643 (1921), recognizing three situations which stand as exceptions to the general rule that exact compliance with the regulations of the insurer is necessary to perfect a change of beneficiary, where: (1) strict compliance is waived by the insurer, (2) literal compliance by the insured is impossible, and (3) insured has taken all the necessary steps but dies before the new certificate is issued. Note also the language in *Reid v. Durboraw*, 272 F. 99, 101 (4th Cir., 1921): "... the power to change the beneficiary is a power of appointment, and the terms of its exercise are fixed by the contract between the insurer and the insured, ... The court has no power to change that contract by changing the conditions upon which the exercise of the power of appointment is limited." The cases are collected in 175 A. L. R. 1220, 1242. This annotation, dealing with the effect of a divorce on the wife's right to take the proceeds of a life insurance policy when she has specifically renounced the right in a property settlement, shows that generally where the insured has not taken the necessary steps to change the beneficiary, the renunciation will be ineffective. However, where it was shown that the beneficiary gave up her rights for a valuable consideration, even though

the insured did not perfect a change of beneficiary, the provision in a property settlement will constitute a waiver.

**Joint Tenants — Survivorship Rights To Real Property After Murder Of One Joint Tenant By Other.** *In Re Foster's Estate*, 182 Kan. 315, 320 P. 2d 855 (1958). The husband was convicted of the murder of his wife, who died intestate. Before his conviction he sold two lots that he and his wife had held as joint tenants. The wife's administrator sought to quash the sale on the ground that a Kansas statute, which provided that no one convicted of a felony will be allowed to share in the estate of the victim, applied in this situation. Judgment for the grantees was affirmed on appeal, the court construing the statute strictly, and rejecting the admittedly equitable basis of the administrator's claim. The court held that the surviving joint tenant takes the property under the original conveyance, and not as a new acquisition under intestate succession. The statutory prohibition, therefore, did not apply because the property never became part of the wife's estate.

While there is no Maryland decision directly in point on this question of joint tenancy, the Maryland Court of Appeals in the leading case of *Price v. Hitafter*, 164 Md. 505, 165 A. 470 (1933), applied the general common law principle that disqualifies a murderer from profiting by his crime. The Court said that neither a murderer nor his heirs will be permitted to share in the estate of the victim. In a joint tenancy death of one tenant merely leaves the surviving joint tenant with his original estate in the property freed from the participation of the deceased tenant, 48 C. J. S.; Joint Tenants, §10, §1. However, this technical distinction has not been adhered to in many jurisdictions. The decisions are in conflict and a variety of solutions have been applied. See 32 A. L. R. 2d 1099. A study of the results will be found in 17 Md. L. Rev. 45 (1957).

**Maryland Retail Instalment Act — What Constitutes Collateral Security.** *United States v. Bland*, 159 F. Supp. 395 (D. Md., 1958). Defendant purchased for \$727 several storm windows and doors on the instalment plan and executed a promissory note, which the vendor endorsed without recourse to the Bank. Despite an unfavorable credit report on defendant, the Bank discounted the note to the vendor. The Government guaranteed the Bank payment pursuant to the National Housing Act, 12 U. S. C. A. (1957) §1701 *et seq.*, which indemnifies home improvement loans. Defendant, discovering that the total cost would be

\$100 more than the contract price, due to finance charges, defaulted in payments. The Government brought suit to recover the balance due. It was conceded that there was no compliance with the Maryland Retail Instalment Act, 7 MD. CODE (1957), Art. 83, §§128 *et seq.* If the instant transaction was covered by the Act, then the contract and sale were void from inception. An instalment sale comes within the purview of the Act if the vendor has taken "collateral security for the buyer's obligation" (§152). Plaintiff contended that no such "collateral security" was present, since the guarantee ran from the Government to the Bank and not to the seller. Judgment was for defendant. The fact that the guarantee did not go directly to the vendor is immaterial in view of the close relationships involved in the transaction. The evidence showed that the vendor would not have sold the storm windows to defendant unless the former had been assured that the Bank would purchase the note without recourse, and that the Bank would not have purchased the note had the Government not guaranteed it against loss. The Bank worked closely with the dealers in an effort to get as much of this profitable business as possible. The purpose of the Act was to protect improvident instalment buyers from unscrupulous practices.

**Reformation Of Instruments — Applicability Of Parol Evidence Rule And Statute Of Frauds.** *Smalley v. Rogers*, 100 S. 2d 118 (Miss., 1958). Plaintiff owned certain surface lands plus one half of the mineral rights. He conveyed these lands to X by warranty deed with no mention of the mineral rights. Both parties understood that plaintiff reserved a one quarter interest in such rights. X conveyed to defendant with the written stipulation that the conveyance was subject to such prior reservations of minerals as were reserved by former grantors. Plaintiff brought this action to reform the deed from him to X to include the mineral reservations. Plaintiff and X both testified as to their intent and that defendant had oral notice of the reservation. Defendant argued that parol evidence showing the intention of the parties to the deed should not be admissible as the deed was plain and unambiguous. The trial court granted the reformation and the decree was affirmed on appeal. When the ground of reform is mutual mistake, an action for reformation of an instrument is outside the field of operation of the parol evidence rule.

See *Hoffman v. Chapman*, 182 Md. 208, 34 A. 2d 438 (1943), holding that the Statute of Frauds is inapplicable

in a suit for reformation of an instrument. Note also the recent enunciation by the Court of Appeals of New York in *Brandwein v. Provident Mutual Life Ins. Co. of Phila.*, 3 N. Y. 2d 491, 146 N. E. 2d 693 (N. Y. 1957). Plaintiff sought to reform an employment contract, alleging he signed it relying on the oral promise of defendant that a clause for renewal commissions which was omitted from the contract would be recorded on the company's official records. The court, in allowing plaintiff relief, held (6-1) that this was more than an oral side agreement to the written contract (which would be inadmissible under the statute of frauds) since plaintiff's signature was procured by fraudulent representation.

**Sales — Suit On Express Warranty — No Privity Of Contract.** *Rogers v. Toni Home Permanent Co.*, 167 Oh. St. 244, 147 N. E. 2d 612 (1958). Plaintiff purchased from a retailer a hair preparation packed in a sealed container which was manufactured by the defendant. This product was nationally advertised by defendant manufacturer as being safe for application to the body when used properly. In applying the preparation as directed to her person, plaintiff was injured. Defendant contended that plaintiff could not base her suit on breach of warranty as there was no privity of contract between the parties. Judgment for defendant was reversed at the intermediate appellate level and this reversal was sustained by the Supreme Court of Ohio. The Court recognized that the prevailing view in Ohio required privity of contract where an action is brought on an express or implied warranty. However, an increasing number of jurisdictions have excepted to this rule in the case of food and beverages, holding that the warranty carried over from manufacturer to consumer. Therefore, the Ohio Court felt it only logical to bring cosmetics sold in sealed packages within the exception, as the public relies solely on the manufacturer's representations, with the retailer being a mere conduit of distribution.

The Maryland Court of Appeals has uniformly held that in the absence of privity of contract an action *ex contractu* based on a warranty will not lie. *Vaccarino v. Cozzubo*, 181 Md. 614, 616, 31 A. 2d 316 (1943). The Maryland Court has allowed recovery in tort where there is no privity in cases involving food and beverages based on the manufacturer's failure to perform his duty to exercise the highest degree of care to see that his product is fit for consumption as represented, *Coca Cola Bottling Wks. v. Catron*, 186 Md. 156, 46 A. 2d 303 (1946) (mouse in bottle) and

*Cloverland Farms Dairy v. Ellin*, 195 Md. 663, 75 A. 2d 116 (1950) (kerosene in bottle). Note MD. LAWS 1958, Ch. 94, which amends the Uniform Sales Act, 7 MD. CODE (1957) Art. 83, Sec. 94(1) to include in the definition of "sale" the serving of food for human consumption for compensation (effective June 1, 1958). For further privity of contract discussion see 13 Md. L. Rev. 154, 161 (1953), 14 Md. L. Rev. 77 (1954) and 18 Md. L. Rev. 80 (1958).

**Statute Of Frauds — Performance Within One Year.** *Hall v. Hall*, 308 S. W. 2d 12 (Tex. 1957). The parties entered into an oral contract, not specifying any time for performance whereby plaintiff was to "develop" a sales territory for products made by defendant. After two years, defendant repudiated the contract when plaintiff had spent \$17,000 of his own money to develop the territory. Plaintiff sued for accrued commissions and damages for the loss of expected future commissions. The parties conceded that it was implied that the contract was to run for a reasonable time. Plaintiff contended that a contract, the term of which is a reasonable time, is one of uncertain duration and therefore not within the statute of frauds, for it can be performed within one year. The jury found that the contract was to run for a reasonable time of three years. The trial court's finding against plaintiff as to expected future commissions was reversed on appeal, but reinstated by the Supreme Court of Texas. In some cases, it is correct to say that a contract is not within the statute of frauds if no period for performance is stated. But this principle is inapplicable to contracts, the implied term of which is a reasonable time. In such cases "reasonable" must be defined in units of time (here, three years). The effect of this determination is to incorporate it into the contract, just as if the term had been originally stated therein. Reasonable time, therefore, is not a term of uncertain duration. Since the contract in the instant case was to run for three years, it is within the statute of frauds and unenforceable.

In Maryland a contract is not within the statute of frauds if it can, by any possibility, be completed within a year, although the parties may have intended that its operation should extend through a much longer period. *Home News, Inc. v. Goodman*, 182 Md. 585, 594-5, 35 A. 2d 442 (1944), and cases cited therein. For a strict application of this statute of frauds section see *Ellicott v. Peterson*, 4 Md. 476 (1853), which held that an oral agreement to reimburse the plaintiff for expenses he incurs to support grandchildren was not within the statute of frauds as the grandchildren



could have died within a year. See 129 A. L. R. 534 discussing the statute of frauds relating to performance within one year, where such performance is improbable or almost impossible. Where one of the parties has substantially changed his position in reliance on an oral contract, an increasing number of courts have applied the doctrine of estoppel, thus preventing the defense of the statute of frauds. *Monarco v. Lo Greco*, 35 Cal. 2d 621, 220 Pac. 2d 737, 739 (1950).

**Streets And Highways — Obstruction Of The Public Way.** 46 *South 52nd Street Corporation v. Manlin*, 26 Law Week 2493 (Pa. Ct. of Com. Pls., Phila., Pa. 1958). Plaintiff brought suit to enjoin defendant from operating a newsstand on the sidewalk abutting plaintiff's store. Plaintiff owned to the middle of the street, subject to the public easement. The court held that because of the need for dissemination of newspapers to the widest possible extent and because of the size and variety of news media today, a newsstand was a reasonable use of the public easement, being essential to the dissemination of news. This case followed the decision of an earlier Pennsylvania case, *Wilson v. McGill*, 42 Pa. D. & C. 74 (1940), which adopted the view that newsstands which do not in fact impede public travel are not a nuisance but rather a necessity and have become a well established custom meeting an urgent public need.

*Contra* to these holdings, the reported cases have consistently found newsstands to be a continuing nuisance which obstruct the public way and not within the scope of the public easement in the street. The majority of decisions proceed from the general proposition that no private person has a right to obstruct the street for a private business. *People v. Buck*, 193 App. Div. 262, 184 N. Y. S. 210 (1920), and *Cowin v. City of Waterloo*, 237 Iowa 202, 21 N. W. 2d 705 (1946). Lunchwagons (permanent or portable) have also been considered obstructions of the public way and consequently removable as nuisances. See 4 A. L. R. 346. But at least one English court appears to have reached a different result. *Rex v. Bartholomew*, 1 K. B. 554, 77 L. J. K. B. N. S. 275 (1908). Also *Henkel v. City of Detroit*, 49 Mich. 249, 13 N. W. 611, 615 (1882), in upholding the use of a public street for a market place, as authorized by the municipality, stated: "City streets are not laid out for the passage of persons and vehicles exclusively, but for all the other purposes to which it is customary to devote them." The Maryland Court of Appeals has not dealt with newsstands specifically or obstructions generally but in

holding that a gas pump near a curb may constitute a nuisance which the municipal corporation may remove, Judge Delaplaine said, "[s]ince the right of the public to use the streets in a proper manner is absolute and paramount, they must be kept free from all nuisances, obstructions, and encroachments which destroy or materially impair their use as public highways." *Adams v. Commissioners of Trappe*, 204 Md. 165, 171, 102 A. 2d 830 (1954). For further discussion of obstructions of street and sidewalk see 105 A. L. R. 1051, 1061, 163 A. L. R. 1334, 1341, and 64 C. J. S., Municipal Corporations, 224, §1774b.

**Torts — Duty Of Landowner To Warn Tenant Of Dangerous Natural Conditions.** *Hersch v. Anderson Acres*, 146 N. E. 2d 648 (Ohio, 1957). The plaintiff, while renting trailer space on a camping site owned and operated by the defendant, suffered infections about her body and head due to poison ivy and poison oak, which the defendant allowed to exist upon the premises. The plaintiff contended that the defendant was negligent in failing to remove and in allowing the noxious weeds to exist. The trial court granted the defendant's motion for a directed verdict. The Court of Common Pleas of Ohio, Erie County, in sustaining the judgment of the lower court, held that the owner and operator of a camp site owes no duty to his tenants to warn them of or remove poison ivy, poison oak or other obnoxious weeds; a person using such facilities assumes the risks of the natural hazards of the outdoors.

Although the Maryland Court of Appeals has never specifically dealt with the problem of injuries occurring to invitees from poisonous weeds existent on the land of the invitor, in *Beverly Beach Club v. Marron*, 172 Md. 471, 192 A. 278 (1937), the court held that the owner and operator of a public beach owed no more than a duty of ordinary care and diligence in removing dangerous objects from the beach, and that the defendant was not negligent by failing to locate and remove a sharp instrument from the swimming area. *Jones v. City of Aberdeen, Maryland*, 138 F. Supp. 727 (D. Md., 1956), held that when a tenant leases property, knowing the general nature and incidence of the land which are open and apparent, he takes the property as it is at the time. See also, *Le Vonas v. Acme Paper Board Co.*, 184 Md. 16, 40 A. 2d 43 (1944), for a good statement of the Maryland law: that a landlord is not liable for injuries occurring to an invitee where the injuries resulted from dangers which are as obvious or familiar to the injured person as to the landlord.

**Torts — Intentional Infliction Of Mental Suffering By Verbal Assault.** *Slocum v. Food Fair Stores of Florida*, 100 So. 2d 396 (Fla. 1958) Plaintiff customer asked a clerk in defendant's store the price of an item. He replied, "If you want to know the price, you'll have to find out the best way you can \* \* \* you stink to me." Plaintiff brought suit to recover for mental suffering and an ensuing heart attack as a result of the clerk's insults, the theory of her case being the intentional infliction of emotional distress. Judgment for defendant was affirmed on appeal. In reviewing the general law in this area, the court noted that RESTATEMENT, TORTS, (1948 Supp.) §46 approves the liability of one who intentionally, and without privilege, causes *severe* emotional distress to another. This rule requires a distinction between conduct likely to cause mere emotional distress and that causing severe emotional distress. The former includes simple vulgarities, indignities or bad manners; the latter, comments so clearly noxious as to exceed all bounds tolerated by society. Because of this nebulous standard, some courts have rejected the RESTATEMENT doctrine in toto. It is true, however, that a stricter duty of courtesy has been placed on businesses of a quasi-public nature: common carriers, theatres, hotels, and telegraph companies. 15 A. L. R. 2d 108, 136. The court concluded that even if it assumed, without deciding, that the Restatement rule was the law in Florida, the facts of the instant case could not come within the scope of that doctrine.

There appear to be no Maryland Court of Appeals cases on verbal assault unaccompanied by an independent tort. But see *Zolet v. Reservoir Construction Corp.*, Daily Record, Dec. 9, 1957 (Sup. Ct. of Balto. City). Plaintiff brought suit to recover for intentional infliction of severe emotional distress and physical injuries resulting therefrom due to the alleged verbal assault of the defendant (from whom plaintiff had purchased a house), to wit: "'Your husband is a son of a bitch. All I wish for you and your family is death, disease and pestilence.'" Defendant's demurrer was sustained. After an extensive summary of the case law and treatises on the subject, Judge Allen concluded that the insulting words did not "'go beyond all possible bounds of decency . . . to be regarded as atrocious and utterly intolerable in a civilized community'", which requirement is necessary for a valid cause of action.

**Trusts — Substitution Of Trustee Constitutionally Incapable Of Administering According To Settlor's Intent.** *In Re Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844

(1958), appeal pending to the United States Supreme Court. The will of Stephen Girard in 1831 appointed the City of Philadelphia the trustee of an endowment fund for the building and maintenance of an "Orphan Establishment" for the care and education of "poor white male orphan children." Pursuant to this direction Girard College was founded and has since been administered by the statutorily created Board of Directors of City Trusts of Philadelphia, which in 1954 denied admission to two Negro male orphans on the basis of the racial limitation in Girard's will. The Supreme Court of Pennsylvania affirmed the Orphan's Court order rejecting the applicants' admission. 386 Pa. 548, 127 A. 2d 287 (1956). The Supreme Court of the United States reversed on the ground that the action of the Board of City Trusts, being an agency of the State, was a discrimination by the State against Negroes which is prohibited by the Fourteenth Amendment. The cause was remanded for further proceedings not inconsistent with the opinion. *Pennsylvania v. Board of Trusts*, 353 U. S. 230 (1957). The Orphan's Court subsequently entered decrees removing the Board of City Trusts as trustee of Girard College and substituted therefor a board of thirteen private citizens not affiliated with the State government. Petitioner contended that the effect of the Supreme Court decision was to require Girard College to admit the petitioners. The Supreme Court of Pennsylvania sustained the decrees, 4-1. The decision of the Supreme Court of the United States was interpreted to mean that the Board of City Trusts, being a State agency, was constitutionally incapable of administering Girard College in strict compliance with the founder's prescribed racial restrictions on admissions without violating the Fourteenth Amendment. Since this decision only affected the *trustee* and not the trust, the judgment of the Orphan's Court in substituting a trustee not acting for the State was in accord and consistent with the Supreme Court decision. It is settled trust law that when a trustee is unable to administer a trust in accordance with the lawful directions and intent of the settlor, a new trustee may be substituted by the proper court to enforce and perfect the objects of the trust. The Pennsylvania Court could find no constitutional sanctions against a *private* trust discriminating on the basis of color, race or creed. Petitioners' argument that Girard College had taken on a "public character" and was therefore subject to the prohibitions of the Fourteenth Amendment was rejected. A trust created for a private purpose cannot become public because of the mode of administration.